91-1580

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991,

OSGOOD TOWER, Petitioner

v.

NORTH ERN VIRGINIA TRANSPORTATION COMMISSION, Respondent
&
BOARD OF SUPERVISORS, FAIRFAX COUNTY VIRGINIA, Intervenor

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May the Virginia Supreme Court void Article VII, Section 10, Subsection (b) of the Virginia Constitution which prohibits the General Assembly from authorizing debt from being contracted by or on on behalf of any county unless general law authorizing the debt is submitted to the qualified voters of the county for approval or rejection?

II. Has due process been denied when the procedures relied on by the Virginia Supreme Court violate Virginia Code 8.01-675.2 (that requires certification for rehearing), established practices of the court, and the Fifth and Fourteenth Amendments of the U.S. Constitution (denying equal protection of the laws)?

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DATES OF JUDGMENT AND REHEARING

The initial Virginia Supreme Court judgment of the Petitioner's appeal was dated April 19, 1991.

The second judgment of the Virginia Supreme Court after a rehearing was dated November 8, 1991.

The Virginia Supreme Court declined on January 10, 1992. to grant the Petitioner's request for a second rehearing.

DATE OF JUDGMENT TO BE REVIEWED

Rehearing - November 8, 1991.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Virginia Supreme Court is invoked under 28 U.S.C. Section 1257(3).

Virginia Supreme Court is voiding Article VII, Section 10, Subsection (10) of the Virginia Constitution. This Article is "Fundamental Law" of Virginia. Traditionally the Court selectively incorporates fundamental rights into the Fourteenth Amendment through its due process and equal protection clauses.

As due process has also been denied by procedural errors and a denial of voting rights, jurisdiction to review the judgment in question has been conferred to this Court by the Fifth and Fourteenth Amendments.

CONCISE STATEMENT OF THE CASE

The Fairfax County Parkway is a four and six lane highway that will extend from Route U.S.1 on the south side of the County to Route U.S. 7 on the north. The Parkway has approximately 7.5 miles completed and 26.5 miles to be built. The estimated cost to completion is $330,000,000. Fairfax County plans to finance the Parkway through the sale of bonds. On completion, the Parkway will still require five additional overpasses yet to be planned (and financed and built) to become fully operational. The Parkway will be totally within Fairfax County, will be paid for by no other than Fairfax County taxpayers (and State and Federal funds) and will be used mostly by Fairfax County residents. The County

estimates that it will reduce traffic on the Washington Beltway at peak hours by 2% to 5% (i.e. minimal effect outside of Fairfax County). It is a secondary road and its main purpose is to reduce "cut-through" traffic in Fairfax County.[1]

Fairfax County would normally finance the Parkway by selling the bonds itself. These bonds would conform to the requirements of Article VII, Section 10, Subsection (b) of the Virginia Constitution which states that "No debt shall be contracted by or <u>on behalf of</u> any county . . . except by authority conferred by the General Assembly by general law . . . The General Assembly shall not authorize any such debt . . . unless provision shall be made for submission to the qualified voters of the county . . . Such approval shall be a

prerequisite to contracting such debt."

The County would also normally acquire the Fairfax County Parkway directly under the Virginia Transportation Service District Act of 1987. Virginia Code 15.1791.2. The Code states: the "Commonwealth Transportation Board means the department of the Commonwealth charged with the principal responsibility for acquisition, construction and maintenance of roads within the interstate, primary and secondary system of highways."

The County Board of Supervisors decided that the Northern Virginia Transportation District Commission (NVTC) should sell the bonds. This was attractive to the Supervisors in that no referendum would have to be held, which would eliminate the possibility of the

voters rejecting the bond issue. This was a good possibility as the November election included voting on several large bond issues for various projects including roads. The Parkway bonds plus the bonds already scheduled for referendum would exceed an amount easily accepted by the voters, would cause the total amount of bonds to approach or exceed Fairfax County's self-imposed bond limit, and would increase the amount of Fairfax County debt to be shown on the record and considered by prospective bond buyers. According to the County's bond counsel, the sole purpose of having NVTC sell the bonds was to avoid the requirement for obtaining the voters approval.[2]

The Northern Virginia Transportation District was established by

Chapter 630, Acts of Assembly (Virginia) 933, March 31, 1964. All the powers and functions of the "Transportation District Act of 1964," Chapter 631, Acts of Assembly (VA) 631, March 1, 1964 were granted to the NVTC by Chapter 630. The Northern Virginia Transportation District was established essentially to coordinate Northern Virginia cities and counties in overseeing the planning, financing, and operation of METRO, the subway-bus system, in conjunction with Maryland and the District of Columbia. The contracts awarded for financing this effort involved "revenue" bonds (revenue being the proceeds from operations) and contracts for the purchase of services on an annual basis. The financing did not include General Obligation Bonds (bonds for which the County is obligated to levy

taxes to make payments). The use of the NVTC for selling bonds for the Fairfax County Parkway solely to avoid obtaining the approval of the taxpayers to sell general obligation bonds is a misuse of the NVTC. NVTC's use for this purpose also appears to violate the Act. Pertinent parts of the Transportation Act of 1964 and comments as to its misuse are attached in Appendix H attached hereto.

In accordance with Virginia Code 15.1-1358.3 the bonds issued by a transportation district have to be validated in accordance with Virginia Code 15.1-213 to 221. On May 4, 1990, NVTC and the Board of Supervisors of Fairfax County submitted a Motion for Judgment for this purpose to the Circuit Court of Fairfax County. Osgood Tower, Pro Se (subsequently retaining counsel),

taxpayer, property owner, and citizen of Fairfax County, submitted a Reply by Party Defendant. On May 29, 1990, Marcia Dykes, citizen, resident and taxpayer of Fairfax County, and John Doe and Jane Doe numbers 1-25, residents and taxpayers of Fairfax County and John and Jane Doe, non-resident taxpayers of Fairfax County, submitted an Answer and Reply to Motion for Judgment through counsel.

The case was substantially heard on June 7, 1990 and on July 12, 1990. A final order validating the bond issuance and was issued on July 12, 1990 and is set forth in Appendix A. The Findings of Fact and Conclusions of Law prefacing the Judgment were thoroughly argued during the hearing. The Court limited its examination to matters of law and fact in regard to the contract with the NVTC and

and the bonds to be issued. It did not deal with other law that had a bearing on the legality of what the NVTC and the County were doing. It did not examine the equitable aspects, especially as to whether or not the NVTC and the County were creating long-term debt that is required by the Virginia Constitution to be approved by the voters. The decision made it possible and necessary to appeal to the Virginia Supreme Court.

On July 27, 1990, Marcia P. Dykes submitted her Petition for Appeal to the Virginia Supreme Court. On July 28, 1990, Osgood Tower, through counsel, submitted his Petition for Appeal to the Virginia Supreme Court.

On February 27, 1991, the Viginia Supreme Court heard arguments of counsel.

The Virginia Supreme Court's

Judgment of April 19, 1991, Reversed and Annulled the Final Judgment of the Circuit Court of Fairfax County, thereby stopping Fairfax County in following its plan to issue the bonds to finance the Fairfax County Parkway without obtaining voter approval.

All the Justices except Chief Justice Carrico were in favor of the decision. The Opinion dated April 19, 1991, was written by Justice Henry H. Whiting. Justice Lacy wrote a concurring opinion but her opinion also presented argument opposing reversing the lower court Judgment. Justice Carrico dissented and wrote a dissenting opinion. These opinions are set forth in Appendix B.

Justice Whiting's opinion, reflecting his wisdom and experience and some of the appellants arguments,

presents an excellent analysis of the case and is incorporated into this statement as if it were the petitioner's own. However, a summarization will be attempted. The issue is whether the County will incur a long-term debt proscribed by the VA Constitution. The debt will be paid from the County's "general revenues", the Business, Professional and Occupational License Tax or any other revenue. The NVTC and County argue that the County-NVTC contract and bond are so worded that the County is not legally liable to make annual appropriations for annual payments, or for the whole debt, and therefore no constitutionally prohibited debt is incurred. The taxpayers argue that because the indebtedness is real and for more than a year, it is long-term

debt contracted without voter approval and violates Article 10(b) of the VA Constitution. The NVTC and the County are seeking to extend the judicially established "special fund" exception to constitutional limitations on incurring long-term governmental debts without voter approval. The special fund exception[3] states: "(N)o constitutionally prohibited indebtedness is created when bonds issued to finance a particular State capital project are to be paid solely from a special fund derived from the revenues of that project; when the legislature is not obligated to appropriate funds for payment of the indebtedness; and. when the indebtedness is not secured by the general faith, credit, and taxing power of the State." "Here. there is no special fund because

no income will be derived from the use of the Parkway; the only source of revenue for bond payments will be the County's annual appropriations, its occupational license receipts, and other state revenues." Justice Whiting refutes the arguments that cite Baliles,[4] and the Attorney General's assertion that the bond issue meets the requirements of the "special fund" doctrine. He states that the contention that the bonds are not "debt" of the County is mere subterfuge, and that we must look to the substance and not the form of the documents. He holds that the County recognizes the disastrous effect of failure to make annual appropriations and would never allow it to occur, and that this would have the practical effect of a long-term debt binding the County. In

explaining the predecessor to Article VII, 10(b), the VA Supreme Court stated "approval by a majority of the citizens voting on the question properly submitted to them, is a prerequisite to the power of the board of supervisors to create an obligation for any purpose, payable at some future time beyond the termination of the current fiscal year. In no other way, directly or indirectly, can the board bind the county on any such obligation." Justice Whiting goes on to say: ". . .the animating purpose of the bond contract arrangement is to create a long-term debt, without submitting the debt to a vote of the qualified voters of Fairfax County." a violation of Article VII. 10(b) of the VA Constitution.

Justice Lacy's opinion is that Justice Whiting's "holding allows the

'disastrous effect' of the failure to perform to create a legal obligation and directly contradicts the holdings and statements made by this Court in numerous prior cases . . ." She also states that "The County's promise to pay . . . does not legally obligate the County to appropriate sums for payment of a debt beyond one year and, therefore, does not run afoul of the constitutional prohibition." On the other hand, she stated the NVTC-County contract violates the Transportation District Act of 1964," and therefore concurs with Justice Whiting, which put her in a position to authorize a rehearing of the appeal.[5]

Justice Carrico states: "I do not understand how, in the face of all indicia of non-indebtedness present in the statute, the contract, and the bonds

involved in the case, the majority can conclude that the County has incurred binding indebtedness in violation of Article VII, 10(b)" of the Virginia Constitution.

In May, June, and July, 1991, three Amicus Curiae from concerned citizens supporting the Judgment of April 19, 1991, of the VA Supreme Court were accepted by the Court. The Court also accepted five Amicus Curiae subscribed by the Governor of Virginia, the Attorney General, the Speaker of the House, the Chairman of the House of Delegates, and numerous chairmen of committees, delegates, senators, associations, counties, cities, bond houses, and other financial institutions objecting to the Court's Judgment and requesting a rehearing and a reversal of the April

19, 1991, decision, and in the event of no reversal - requesting the Court to limit the effect of its decision to future bond issues (prospective only). These Amicus Curiae express a concern that the Judgment would invalidate existing bonds and restrict future financing by the State and localities. These concerns are overstated as perhaps a majority of the financing cited is for revenue bonds, service contracts, and installment purchases which are not affected by the Judgment. However, much of the existing and planned financing is violative of the VA Constitution and should be brought under control. Appellant Tower objected to the Amicus Curiae as they were submitted after the Appeal Judgment and were not authorized by the Rules of the Supreme Court. The

Court did not rescind its acceptance of the Amicus Curiae.

On May 16, 1991, Fairfax County petitioned the Court for Rehearing, which was granted by the Court, even though the request did not provide any proper reasons for granting a rehearing.

The Rehearing was held on September 17, 1991, and no arguments were made by the County or the Virginia Attorney General that had not been presented before.

On November 8, 1991, the Court issued its Judgment and reversed the decision of April 19, 1991. This opened the way for Fairfax to proceed with its bond issuance.

On November 20, 1991, Osgood Tower, through his Counsel, Fredrick H. Goldbecker, filed his petition for a

second rehearing. His petition was based on the following irregularities that appear to violate due process guaranteed by the Virginia Constitution and the Fifth and Fourteenth Amendment of the United States Constitution.

1. On September 10, 1990, the VA Supreme Court awarded a writ of error to appellants Tower and Dykes. In accordance with VA Code 15.1-219, these cases were placed on the privileged docket to be heard on January 7, 1991. On January 4, Tower's counsel was notified that the Court had continued oral argument to its February term. No reason was given. Almost all the cases heard in the January term were not privileged. The case was heard on February 27, 1991. Tower was not given equal protection under the law as his

privileged case was not scheduled as promptly as non-privileged cases.

2. On April 19, 1991, the Court handed down its decision to reverse the lower court. Justice Lacy dissented from the majority opinion, but nominally concurred, based on a violation of statute - an argument not made by either appellant in the record or oral argument, thereby denying due process by violating established practice.

3. On June 4, 1991, the Court granted a rehearing to the appellees for September 16, 1991. On September 3, Tower's counsel called the Clerk of the Court in regard to procedure. He was notified that the appellees (County) had the burden of proof. On September 11, 1991, the Clerk of Court notified Tower's counsel that the burden of proof

had been switched to the original appellants (Tower). This change appears to result from the Court's making the oral argument a de novo proceeding in direct conflict with generally established procedures and the established procedures of the VA Supreme Court.

4. It is a generally understood principle that a rehearing is confined to instances where it is alleged that the decision was based on a wrong principle of law, a conflict with an express statute or controlling decision to which the court's attention was not called, where a higher court had decided the precise question adversely after the decision, where there has been a misconception by the court of proof in a material regard, where the decision is

based on a false record or was misconstrued by the appellate court, or where a mistake in fact in the opinion or judgment must be corrected.[6] As none of these conditions existed to justify this rehearing, due process has been denied and Tower has not received equal protection of the law.

5. On June 18, 1991, a Continuing Legal Education seminar was held in Richmond, VA, on the subject of "Making an Appeal to the Supreme Court of Virginia," taught by Virginia Supreme Court Justices. All Justices took part in the seminar. The "Rehearing of a Decision" was taught by Justice Hassell, who did not depart from the Handbook published for the seminar. The Handbook stated:

"Counsel should have a sound basis

for requesting a rehearing. Simply desiring to halt the issuance of the mandate is not a sufficient reason. Petitions should not challenge the legal principles adopted in the opinion unless controlling decisions have been rendered or statutes adopted subsequent to oral argument that affect the legal principles. Petitions however appropriate should identify misstatements of fact, verifiable in the record. that affect tne court's analysis. A petition that reargues points made in the earlier briefs and rejected by the Court is not acceptable and will be viewed with disfavor. (emphasis added)

The VA Supreme Court did not follow these established procedures in this rehearing.

and has denied due process and equal protection under the law.

5. The same personnel on the panel for the appeal were not all called for the rehearing. The new personnel voted to sustain the lower court's judgment, reversing the decision of the original judgment of the Court of November 8, 1991. Justice Whiting's dissent of November 8, 1991, noted that "A rehearing of this case has produced no arguments which were not made and considered when a majority of this Court decided tnat the proposed bond issue was invalid." Without such argument, the only reason for the reversal of the prior panel's decision is the change of personnel on the panel. Had the original personnel been used for the renearing panel, it is unlikely that the decision would have been reversed.

Had the appeal hearing been held on the original scheduled date, Justice Russell might not have been retired at the time of the rehearing. Justice Russell could have been called back or delayed his retirement. In the appeal, Justice Lacy voted to reverse the lower court's decision; in the rehearing, she voted to sustain. This change was not based on new arguments. Her probable assenting to the rehearing (certification), plus her voting in the appeal with the majority for reversal when her written sentiments were heavily in favor of sustaining, plus voting to sustain in the rehearing, is hard to understand. Justice Carrico could have appointed only the five justices who had been on the original panel and still had the four needed for a quorum. It is obvious that

absolutely no attempt was made to provide Tower with due process and that failure violated his constitutional rights and is offensive to fundamental principles of justice. The voting record of the two panels is shown below. The above actions of the Virginia Supreme Court violate Tower's rights to equal protection of the laws guaranteed by the Fifth and Fourteenth Amendment of the U.S. Constitution. In this case, the standard procedures generally applied to rehearings and the specific procedures of the VA Supreme Court have been suspended so that Tower has not been treated in the same way all others have been treated in regard to rehearings.

APPEAL		REHEARING	
FOR REVERSAL	TO SUSTAIN	FOR REVERSAL	TO SUSTAIN
Whiting		Whiting	
Stephenson		Stephenson	
Poff		Poff	
Harrison			
Russell			
Lacy			Lacy
	Carrico		Carrico
			Compton
			Keenan
6 - to - 1		3 - to 4	

The most significant violation of due process, which alone calls for a decision by the U.S. Supreme Court to set aside the VA Supreme Court's decision to

sustain the lower court's validation of the Fairfax County Parkway Bonds, is the failure of the Virginia Supreme Court Justice that found that there was good cause to rehear this case to certify that in his or her opinion there is good cause for such rehearing. Virginia Code 8.01-675.2 (Rule of VA Supreme Court 5:39(d)) states in pertinent part that a rehearing may be granted:

> ". . . if one of the justices who decides the case adversely to the petitioner certifies that in his opinion there is good cause for such rehearing." (emphasis added)

Black's Law Dictionary, Sixth Edition, states:

"Certificate . . . A 'certificate'

by a public officer is a statement written and signed, but not necessarily sworn to, which is by law made evidence of the truth of the facts stated for all or for certain purposes..." "Certify. To authenticate or vouch for a thing in writing."

"In a letter dated January 2, 1992, to Neil F. Markva, Esq. of Springfield, VA, the Clerk of the VA Supreme Court stated: " . . .the Court has directed me to advise you that in a court conference one of the justices who voted adversely to the petitioner certified there was good cause to grant a rehearing. The Court is of opinion that this procedure complies with the provisions of Code 8.01-675.2." In a similar letter of January 21, 1992, the Clerk stated: "the

Court reiterates . . . it does consider the procedure outlined in my January 2 letter to be in compliance with Code 8.01-675.2, the certification in this, as well as all other granted rehearing cases, is not in writing."

On about January 15, 1992, Tower filed a "Motion for Filing of Certificate for Rehearing Required by Virginia Code 8.01-675.2." The Court was requested to file the certification or state that no such document exists.

On February 4, 1992, Tower filed a 13 page "Motion. . .to Vacate this Court's Decision of November 8, 1991 for Lack of Jurisdiction." This motion concluded that: "By the rehearing proceeding not complying with Virginia Code 8,01-675.2, this Court did not have jurisdiction to hear and decide the

appellees' petition for rehearing, and such hearing and decision without jurisdiction violates Tower's constitutional rights under Virginia Constitution Article I, Sec. 11, and under the United States Constitution, Amendments Fourteen and Five, and Tower's rights under federal statutory civil laws.

As of March 20, 1992, no decision on this Motion has been received.

On February 4, 1992, the Clerk of the VA Supreme Court wrote an Order Deferring Issuance of Mandates and said the mandates will be deferred until the 9th of April at which time they may be issued unless the case has been docketed in the Supreme Court of the United States in which event the mandates will be deferred until the final determination of

the case by that Court.

As of March 20, 1992, no decision has been received from the VA Supreme Court. The Clerk of Court reports that the VA Supreme Court is considering this motion and will hand down a decision, unless Tower petitions the U.S. Supreme Court for Certiorari before such a decision.

Appellant Tower's financial cost, if the decision of the Fairfax Circuit Court to allow NVTC (Fairfax County) to sell Fairfax County Parkway Bonds is allowed to stand, will amount to an increase in taxes amounting to $100 to $200 per year for a period of fifteen to thirty years. He will also lose his constitutional right to vote on these bonds (an intangible property right under

Amendments V and XIV the U.S. Constitution).

In Marcia P. Dykes' "Supplemental Memorandum of Points and Authorities in Support of Defendants' Answer and Reply to Plaintiffs' Motion for Judgment" of June 7, 1990, on page 17, she says "The Board of Supervisors of Fairfax County, in approving the contract with NVTC, . . . has discriminated against the payers of the taxes on businesses, professions and occupations by denying them equal protection of the law in violation of Amendment XIV of the Constitution of the United States of America."

In his "Reply by Party Defendant" of May 28, 1990, and oral argument of June 7, 1990, Defendant Tower cited the Virginia Constitution Article VII, 10(b) and thereby invoked the United States

Constitution.

The NVTC and Fairfax County raise Virginia constitutional issues on pages 3,5,7,8,9,10,11,12,13,29,33, and 35, of its Supplemental Memorandum of Law Addressing Respondents' Objections to Entry of Final Order, in suport of its motion of June 15, 1990. Among the issues raised is that of Article VII 10(b) which requires voter approval of long-term bond issues. This issue invokes the United States Constitution in two ways. First, the U.S. Supreme Court traditionally incorporates into the 14th Amendment state constitutional provisions that are "fundamental rights." Secondly, as Justice Whiting said in his opinion of April 19, 1991, "The issue is whether the County will incur a long-term debt proscribed by Article VII 10(b) of the

Constitution of Virginia." As the long-term debt is proscribed because it denies the right to approve the bonds by vote, it is a denial of voting rights under the 5th and 14th Amendments of the U.S. Constitution.

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1. Testimony of Mr. Pant, Fairfax Board of Supervisors meeting on November 20, 1989 page 35.
2. Page 152 Appendix of Appellant ("general obligation bonds" is a disguise for "bond issues requiring referendum"). Also page 161 (and generally pages 152 et seq.) of the verbatim transcription of Fairfax County Circuit Court Proceedings of June 7, 1990.
3. Attorney General Opinion (Virginia), of December 29, 1989.
4. Baliles v. Mazur, 224 Va. 462,471,297,S.E.2d 695,699 (1982).
5. Virginia Code 8.01-675.2 (Rule 5:39 of VA Supreme Court)
6. 5 Am Jur 2d, Appeal and Error, Sec. 988, 415.

REASONS FOR GRANTING THIS WRIT

Certiorari should be granted for the following reasons:

The Virginia Supreme Court has decided that Article VII 10(b) of the Virginia Constitution (requiring the contracting of debt by a county to be submitted to the voters for approval or rejection) may be circumvented by judicial fiat. This decision is repugnant to the Constitution of the United States. If this decision is not reversed by the U.S. Supreme Court, this provision of the Virginia Constitution is nullified and will no longer be invoked prior to the creation of county debt in the Commonwealth of Virginia. The degradation of the Virginia Constitution will establish a precedent that will weaken the authority of state constitutions and

of the Federal Constitution.

> "The state constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates 34, and the legislature, the executive officers, and the **judiciary** cannot lawully act beyond its limitations 35. Disobedience or **evasion** of a constitutional mandate may not be tolerated even though such disobedience may, at least temporarily, promote in some respects the best interests of the public 36. Neither emergency 37 nor economic necessity justifies a disregard of cardinal constitutional guarantees." 16 Am Jur 2d Section 81

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34 State ex rel., Lemon v Langlie, 45 **Wash** 2d 82, 273 P2d 464; John F Jelke Co. v Emery, 193 **Wis** 311, 214 NW 369, 53 ALR.

35 Travelers' Insurance Co. v Marshall, 124 **Tex** 45, 76 SW 2d 1007, 96 ALR 802; State ex rel. Lemon v Langlie, 45 **Wash** 2d 82, 273 P2d 464; Puget Sound Power & Light Co. v Cowlitz County, 38 **Wash** 2d 907, 234 P2d 506 (ovrld on other grounds Air Force Housing, Inc. v Spokane County 56 Wash 2d 642, 354 P2d 903).

36 Riley v Carter, 165 **Okla** 262, 25 P2d 666, 88 ALR 1018

37 Section 82 infra.

The final Virginia Supreme Court ruling of November 8, 1991, has had substantial influence on the award of large dollar bond issues within the Commonwealth.

The final Virginia Supreme Court decision of November 8, 1991, confirms the legality of other (unconstitutional?) planned Virginia bond issues. A U.S. Supreme Court decision in this area would shed light on the possibly unconstitutional decisions of a number of other states' supreme court decisions which allow the voiding of constitutional requirements for voter approval of bond issues.

> "On April 19 (1991), the Virginia Supreme Court ruled (initial decision) that a proposed $330 million lease-secured bond issue of the Northern Virginia Transportation District Commission violates the state's constitutional debt restric-

> tions. The bonds were to be sold to finance the completion of the Fairfax County Parkway....S&P (Standard and Poor), because of this ruling, will decline to rate future lease-secured obligations in Virginia unless....S&P rates 19 unenhanced Virginia state and local lease transactions with an outstanding par amount of $506 million.....With this ruling, Virginia joins New Mexico as the only state with recent Court decisions that invalidate leasing as a 'non-debt' capital financing alternative. Over the past several years lease validity has been either upheld or expanded in all other state supreme court cases," Standard & Poor's Corporation, Press Release, May 15, 1991. Amicus Curiae, Anderson & Strudwick, Inc., et al. Appendix B. (The terms "lease, leasing, and lease-secured" are euphemisms for "bonds requiring voter approval.")

Whether or not state constitutions may require special voter approval of the issuance of bonds has been of previous interest to the U.S. Supreme Court:

> "On recent count, thirty-one state constitutions require a referendum by at least one unit of local government as a prerequisite to incurring at least one type of local debt. In some states the referendum

> requirement attaches to all political subdivisions; in others, to counties and municipalities. Thirteen state constitutions require a special majority in at least some bond referenda (64), a special limitation which the United States Supreme Court upheld in a 1971 challenge to West Virginia's requirement that political subdivisions may not incur bonded indebtedness without the approval of 60 percent of those voting on a referendum."

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(63) Note, "Judicial Activism and Municipal Bonds: Killing Two-Thirds with One Stone?" 56 Va. L. Rev. 295, 331-34 (1970)
(64) Ibid.
(65) Gordon v. Lance 403 U.S. 1 (1970).

The intense interest in and the importance of the case at bar is shown by the number and source of amici curiae briefs submitted:

> Amicus Curiae of the Commonwealth of Virginia subscribed by: Governor of the Commonwealth of Virginia
> Speaker of the House of Delegates
> Chairman of the Senate Finance Committee

Chairman of the House Apropriations Committee
Chairman of the House Finance Committee
The Local Government Attorneys of Virginia, Inc.
The Virginia Association of Counties
Ine Virginia Municipal League
The Virginia Government Finance Officers Association
The Virginia Government Finance Officers Association of the Metropolitan Washington Area
The County of Arlington Virginia The County of Loudoun, Virginia
The County of Roanoke, Virginia
Tne County of Scott, Virginia
The County of York, Virgina

Supplemental Amicus Curae Brief of Anderson & Strudwick, et al. and the Commonwealth of Virginia

Brief amicus Curiae of Chesterfield County. Virginia and the City of Roanoke, Virginia

Amicus Curiae Brief of Rockingham County. Virginia

Amicus Curiae Brief of Anderson & Strudwick, Inc.
Branch Cabell & Co.
Central Fidelity Bank,
Crestar Financial Corporation,
Davenport & Co. of Virginia, Inc
Dominion Bank, National Association

Scott & Stringfellow Investment Corporation
Signet Credit Corporation
Wheat, First Securities, Inc.
Virgina Chamber of Commerce

Amicus Curae Brief of Citizens Against Pledge Bonds Inc.
Patrick M. McSweeney
Stephen T. Gannon
McSweeney, Burtch & Crump, P.C.

Amicus Curiae Brief for the Following People and Organizations of the Commonwealth of Virginia:
The Honorable Gloria T. Fisher.
Professor Gary T. Amos
Honorable Mark Siljander
Honorable Lawrence D. Pratt
John F. Herrity, Former Chmn., Fairfax Cty. Board of Supervisors
Neil F. Markva, Counsel of Record for Amici Curiae
Honorable Gwendalyn F. Cody
Craig C. Markva, Chairman, Fairfax Cy. Young Republicans
Brig. Gen. Benton Partin (Ret.)
41 Additional organizations, persons, and qualified citizen voters

Brief Amicus Curiae of Nancy Tower and Ernest R. Blevins

Statement in Support of the Reply Brief of Marcia P. Dykes and the Amicus Curiae of Citizens Against Pledge Bonds, Inc., The Arlington

Taxpayers Association

This petition is of concern to the voters of Virginia. On November 8, 1990, Virginia voters rejected a proposed constitutional amendment to allow a new category of local debt for transportation purposes which would be secured by pledged local tax revenues, subject to limits on the amount of debt, and exempt from county voter approval requirements and municipal debt limits. The proposal was rejected 837,885 against to 262,689 in favor. If the final Virginia Supreme Court ruling of November 8, 1991, is allowed to stand. the constitutional amendment rejected by the voters will be put into effect by judicial fiat.

The requirement for voter approval of long term borrowing has been in the Virginia Constitution since 1928 and is a

fundamental right of the citizens of Virginia and should not be destroyed by judicial fiat.

In addition to the above, the Virginia Supreme Court, through fundamental unfairness, has denied petitoner Tower's due process and equal treatment under the law guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution (see Concise Statement).

CONCLUSION

This Petition for certiorari should be granted.

To maintain the integrity of Constitutional govermnent in the United States it is essential that the Virgina Supreme Court decision of November 8, 1991, be overturned.

The Virginia Supreme Court decision on appeal of April 19, 1991, should be reinstated.

The procedural irregularities of the Supreme Court should be a part of the basis for overturning the Virginia Supreme Court decision.

Because it is impossible to reverse decisions to build roads and buildings after they are built, and because it is unreasonable to increase the financial instability of this country, and it is

unjust to cause unnecessary financial loss to innocent bond holders, the effect of a decision to reverse the November 8th decision and reinstate the April 19, decision should be made prospective only.

Osgood Tower
4200 Pineridge Drive
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Pro Se

Fairfax County Virginia Circuit Court No. 97040
Virginia Supreme Court No. 901037 (and 901033)

C E R T I F I C A T E

I, Osgood Tower, Pro Se, hereby certify that on this 2ND day of APRIL, 1992 three copies of the Writ of Petition in the above-entitled case were mailed first class postage prepaid to James H. Falk, Jr.. and Scott A. Mills, M Street, N.W., Counsel for Marcia P. Dykes, et al, 2445 M Street, N.W., Washington, DC 220037; to Robert L. Howell, Acting County Attorney, Robert Cherin, Deputy Copunty Attorney, Ellen F.M. Posner, Assistant County Attorney. Counsel for Fairfax County Board of Supervisors Appellee Intervenor, 4100 Chain Bridge Road, Fairfax, Virginia. 22030; and William J. Strickland, Counsel for Northern Virginia Iransportation District Commission, McGuire, Woods, Battle & Boothe, One James Center, Richmond, Virginia 23219; and A. Francis Robinson, Jr., Bond Counsel and Co-Counsel for Fairfax County Board of Supervisors, Brown & Wood, One World Trade Center, New York, NY, 10048. I further certify that all known parties to be served have been served.

Osgood Tower

Osgood Tower, Pro Se
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703-280-1661

V I R G I N I A :

IN THE CIRCUIT COURT OF NORTHERN VIRGINIA

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION,

Plaintiff

and

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA

Intervenor,

v.

TAXPAYERS, PROPERTY OWNERS AND CITIZENS OF THE COUNTIES OF ARLINGTON, FAIRFAX AND LOUDOUN AND THE CITIES OF ALEXANDRIA, FAIRFAX AND FALLS CHURCH CHURCH, VIRGINIA, INCLUDING NONRESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND ALL OTHER PERSONS AFFECTED BY OR INTERESTED IN THE ISSUANCE OF SAID BONDS.

Defendants.

At Law No. 97040

VALIDATION OF NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION FAIRFAX COUNTY TRANSPORTATION CONTRACT REVENUE BONDS AND OF THE OBLIGATIONS OF FAIRFAX COUNTY, VIRGINIA, UNDER A CONTRACT WITH SUCH COMMISSION.

FINAL ORDER

FINAL ORDER

This matter came to be heard the 7th day of June, 1990, upon the Motion for Judgment filed by Plaintiff, Northern Virginia Transportation District Commission (the "Commission" or the "District"), and Intervenor, Board of Supervisors of Fairfax County, Virginia (the "County". and collectively with the Commission, the "Plaintiffs"), The Memorandum of Law submitted by the Plaintiffs in support of their Motion for Judgment, the affidavits of publication from officials of The Washington Post, the evidence and testimony and briefs presented before this Court on June 7, 15, 21 and July 12, 1990, and argument of Counsel, and

upon consideration thereof,

it appearing to the Court that the plaintiffs have complied fully with the prior Order of this Court dated May 4, 1990, that Plaintiffs publish, once a week for two consecutive weeks in The Washington Post, a newspaper having general circulation in each of the component governments of the District - the cities of Alexandria, Fairfax and Falls Church and the counties of Arlington, Fairfax and Loudoun - the second publication to be at least ten (10) days before the hearing on June 7, 1990, the prior Order preceded by the caption "Notice of Hearing re Validation of Northern Virginia Transportation District Commission Fairfax County Transportation Contract Revenue Bonds and Transportation Improvements Contract" and the Motion for Judgment;

THIS COURT MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. This Court has jurisdiction of the subject matter pursuant to the provisions of Article 6, Chapter 5, Title 15.1, Code of Virginia, 1950, as amended (the "Code"), entitled "Judicial Determination of Validity of Bonds" (the "Validation Act"), by virtue of the provisions of Code Section 15.1-1358.3. Attachment C is incorporated herein.

2. This action is properly brought in Fairfax County, Virginia, by virtue of the provisions of Code 15.1-214 of the Validation Act, and (ii) Code Section 15.1-1360 of Chapter 32, Title 15.1, Code of Virginia, 1950, entitled the "Transportation District Act of 1964" (The "District Act").

3. The Commission is authorized under

the provisions of the District Act and Chapter 630, 1964 Acts of Assembly, as amended (the "NVTC Act"), to issue the Fairfax County Transportation Contract Revenue Bonds (the "Bonds"). The Commission is authorized to issue bonds under the NVTC Act and the District Act to finance public highways.

4. The Commission has the authority under the District Act to enter into the Transportation Improvements Contract (the "Contract") with the County to provide or cause to be provided transportation facilities. Public highways are "transportation facilities" within the meaning of Code Section 15.1-1344(i) of the District Act.

5. The County is authorized, under the provisions of Code Section 15.1-1359(a) of the District Act, to enter

into the Contract with the Commission. pursuant to which the Commission undertakes to provide or cause to be provided, transportation facilities specified in a duly adopted transportation plan. The obligation of the County under the Contract to make the payments described in Article IV of the Contract does not constitute "bonded debt" within the meaning of Code Section 1359(b) of the District Act. Attachment B is incorporated herein.

6. Attachment A is incorporated herein.

7. The unfunded segments of the Fairfax County Parkway (referred to in the Contract as "Transportation Improvements") are specified in a transportation plan within the meaning of Code Section 15.1-1359(a) of the District

Act, and the transportation plan has been duly adopted pursuant to Code Section 33.1-70.01.

8. The bonds, when issued, will be limited obligations of the District payable solely from the payments received from the County pursuant to Section 4.01 of the Contract which payments and other revenues and funds shall be pledged by the Trust agreement to the payment of the Bonds in the manner and to the extent particularly specified by the Trust Agreement. As provided by Code Section 15.1-1358.2(2) of the District Act, (i) neither the component governments of the District nor any person executing the Bonds shall be liable personally on the Bonds by reason of the issuance thereof, (ii) the Bonds (the form of which contained in the Trust Agreements so

states on their face) shall not be a debt of the Commonwealth of Virginia or any political subdivision thereof (including the District and any component governments of the Commission), (iii) neither the Commission nor any political subdivision thereof other than the Commissison shall be liable thereon, and (iv) the Bonds will not directly, indirectly or contingently obligate the Commonwealth of Virginia or any of its political subdivisions (including the Commission and the component governments of the Commission) to levy taxes or make appropriations for the payment of the Bonds. The Bonds issued pursuant to the provisions of the Trust Agreement will be valid and legal obligations of the Commission payable in accordance with their terms.

9. The obligations of the County with respect to the payments required by Article IV of the Contract, including the annual payments required to pay debt service on the Bonds, are expressly conditioned and contingent upon and co-extensive with the annual appropriation by the Board of Supervisors of amounts for the purpose of paying such obligations.

10. No substantial defect or material error or omission within the meaning of Code Section 15.1-221 of the Validation Act has occurred or exists with respect to the Bonds or the Contract.

IT IS THEREFORE ADJUDGED, ORDERED AND DECREED:

1. That judgment is entered validating and confirming Northern

4. That the Bonds will be valid limited obligations of the Commission payable solely from funds derived by the Commission from the Contract.

5. That neither the faith and credit of the Commonwealth of Virginia nor the faith and credit of any political subdivision thereof (including the Commission and the component governments of the Commission) are pledged to the payment of the principal of or the interest or premium, if any, on any Bond. The Bonds shall not be a debt of the Commonwealth or any such political subdivision, other than the Commission, shall be liable thereon. The Bonds do not directly, indirectly or contingently obligate the Commonwealth or any of its political subdivisions.

6. That the Commission is authorized to enter into the Trust Agreement with the Trustee and the Contract with the County, and the Trust Agreement and the Contract will constitute valid legal and binding agreements of the Commission.

7. That the County is authorized by Virginia law, including the District Act, to enter into the Contract with the Commission.

8. That the proceedings taken by the County in connection with the approval of the Contract, including the adoption of the County Resolution and the adoption of the transportation plan, are legal and valid.

9. That the Contract will constitute a valid, legal and binding agreement of the County enforceable in accordance with its terms.

10. That the County is authorized to discharge its obligations under Article IV of the Contract in its discretion in whole or in part by appropriations from general revenues of the County, subject to the annual maximum obligation fixed by the Contract for payments to meet such obligations.

Accordingly, the request of the plaintiff Northern Virginia Transportation District Commission and the intervenor Fairfax County, Virginia, for an order validating the Bonds and the Contract is granted, and judgment is hereby entered accordingly.

ENTERED this 12th day of July, 1990.

/S/

THOMAS J. MIDDLETON, JUDGE

WE ASK FOR THIS:.....

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Seen and objected to per written and oral record

/S/
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ATTACHMENT A

With regard to this Court's previous ruling of June 7, 1990, on the issue of consideration, this Court reverses said ruling and holds that Article V of this Contract does not constitute valid consideration. This Court further holds that a contract which has been signed and

sealed presumes consideration and, therefore, this Court need not examine the consideration in the Contract, provided that the Contract as presented herein is executed and delivered under seal by the parties.

ATTACHMENT B

The terms of the Contract are consistent with the legislative policy set forth in Enabling Act Section 15.1-1343, and the terms of the Contract are not offensive to public policy.

ATTACMENT C

The action before this Court, pursuant to Virginia Code Section 15.1-212 et. seq. is purely a statutory proceeding. Therefore, this Court will not consider the arguments asserting the application of equitable principles raised by the Respondents herein.

Present: Carrico, C.J., Stephenson, Russell, Whiting, and Lacy, JJ., Poff Senior Justice, and Harrison, Retired Justice

MARCIA P. DYKES

v. Record No 901033

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

OPINION BY JUSTICE HENRY H. WHITING
April 19, 1991

OSGOOD TOWER

V. Record No. 901037

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION,ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
Thomas J. Middleton, Judge

This is a proceding to validate a proposed bond issue to be repaid solely by funds appropriated by a county's board of supervisors, and which is not to be submitted to a vote of the people. The issue is whether the county will incur a long-term debt proscribed by Article VII, Sec. 10(b) of the Constitution of

Virginia (Article VII, Sec. 10(b)).

In order to finance a part of the cost of completing the Fairfax County Parkway, the Fairfax County Board of Supervisors (the county) approved a proposed contract (the contract) with the Northern Virginia Transportation District Commission (the commission). The contract would obligate the commission to issue its "Transportation Contract Revenue Bonds" (the Bonds) in an aggregate amount not to exceed $330,000,000. In return, the county would agree to fund the annual principal and interest payments and other listed expenses of the bond issue, to be disbursed by a trustee.[1] These funds would come from the county's "general re-revenues and from the "Business, Profes-

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[1]Subject to a reserved right not to make the appropriations, the county would also pay the commission's listed expenses.

sional and Occupational License Tax . . or any other revenue appropriated . . . in substitution for or in addition thereto by" the county.

However,Section 4.05 of the contract would provide that

> (t)he obligation of the County to make any payments. . . is contingent upon the appropriation for each fiscal year by the Board of Supervisors of the County of funds from which such payments can be made. The County shall not we liable for any amounts that may be payable pursuant to this Contract unless and until such funds have been so appropriated for payment and then only to the extent thereof. It is understood and agreed by all parties hereto that nothing in this Contract shall be deemed to obligate the Board of Supervisors of the County to appropriate any sums on account of any payments to be made by the County hereunder. This Contract shall not constitute a pledge of the full faith and credit of Fairfax County or a bond or debt of Fairfax County in violation of Sections 10 of Article VII of the Constitution of the Commonwealth.

As security for the payment of the

bonds, the commission would transfer its interest in the contract by a proposed trust agreement (the trust agreement). The trust agreement, and the bonds themselves, would provide that "(t)he Bonds are limited obligations of the Commission payable solely from" the moneys provided to the Trustee by the County. The trust agreement further would provide that "(t)he obligation of the County . . .to make such payments . . .is subject to and contingent upon the annual appropriation by the County of moneys for such purposes."

On May 4, 1990, pursuant to the provisions of Code Sec. 15.1-214, the commission and the county, as a Plaintiff/Intervenor (the plaintiffs), filed this bond validation proceding against the "(t)axpayers, property owners

and citizens" of Fairfax County and other localities serviced by the commission. Osgood Tower, Marcia P. Dykes, and "John Doe and Jane Doe numbers 1-25," Fairfax County citizens and taxpayers (the taxpayers), opposed the bond validation.

On July 12, after extended hearings and argument, the trial court validated the proposed bond issue. The taxpayers appeal.

The taxpayers argue that because the indebtedness represented by the bond issue would extend for a period beyond the fiscal year of its proposed year of issue, it would be a long-term debt congtracted by the county without voter approval. Therefore, the taxpayers contend that the bond issue would violate the following provision of Article VII, Sec. 10(b):

> No (long-term) debt shall be contracted by or on behalf of any county . . . except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt (except listed debts not relevant here) unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt.

The plaintiffs respond that the financing plan would not violate Article VII, Sec. 10(b) because they say that contracts subject to appropriation and bonds payable solely from payments pursuant to such contracts are not 'debts' as prohibited by the Virginia Constitution. Here, the plaintiffs seek to extend the scope of what is known as

the "special fund" exception to constitutional limitations upon incurring long-term governmental debts without voter approval.

In a case dealing with a long-term state debt and analogous constitutional limitation upon the state's power to incur such debts, we summarized the special fund exception by quoting from Miller v. Watts, 215 Va. 836, 841, 214 S.E.2d 165, 169 (1975):

> No constitutionally prohibited indebtedness is created when bonds issued to finance a particular State capital project are to be paid solely from a special fund derived from the revenues of that project; when the legislature is not obligated to appropriate funds for payment of the indebtedness; and, when the general indebtedness is not secured by the general faith, credit, and taxing power of the State.

Baliles v. Mazur, 224 Va. 462, 469-70, 297 S.E.2d 695, 699 (1982) (emphasis added).

The plaintiffs rely upon three cases in which an analogous constitutional limitation was considered in connection with long-term indebtedness proposed for the state's benefit. In those cases, we held that those indebtednesses would not be within the constitutional limitations because they were to be paid solely from special funds derived from the revenues of the financed projects. Baliles, 224 Va.at 466, 297 S.E.2d at 697 (rent for government's use of office and other buildings); Harrison v. Day, 202 VA. 967. 970, 121 S.E.2d 615, 617 (1961) (rent for use of port facilities); Almond v. Gilmor 188 Va. 822, 840, 51 S.E.2d 272, 279 (1949) (toll fees and other charges earned by bridges and ferries). Here, there is no special fund because no income will be derived from the use of

the Parkway; the only source of revenue for bond payments will be the county's annual appropriations from its occupational license receipts and other state revenues.

The plaintiffs contend that this would make no difference because we said in Baliles that "(t)he overriding consideration, therefore, is whether the legislative body is obligated to appropriate the funds, not the source or composition of the special fund." 224 VA. at 471, 297 S.E.2d at 700. That statement, however, was made in response to a contention that the "special fund" doctrine could not be applicable in Baliles because the rent to be paid by the Commonwealth for its use of the buildings was a "fund consist(ing) entirely of money appropriated by the

legislature." Id. As noted above, however, Baliles concerned a revenue-generating project and is therefore inapposite. Thus, this is the first case in which we have considered the implications of Article VII, Sec. 10(b) in circumstances where the facility financed will not be a revenue-generating project.

In Terry v. Mazur, 234 Va. 442, 362 S.E.2d 904 (1987), we considered a statutory scheme purporting to authorize the Commonwealth Transportation Board to issue revenue bonds to finance highway improvements. The bonds were to be secured by a "pledge" of future excise and other taxes, as well as fees relating to motor vehicles. The attorney General contended that bond issue met the requirements of the "special fund"

doctrine to projects other than those which generate their own revenues. Id. at 455, 362 S.E.2d at 911. We adhere to that view.

The plaintiffs also contend that the bonds would not be a "debt" of the county because the bonds would be issued by the commission, not by the county. That, in our view, is a mere subterfuge. Because the trust agreement and the bonds themselves look to annual appropriations of the county's funds as the sole source for repayment of the bonds, it is of no consequence that bonds would be issued by the county's alter ego. We must look to the purpose of the instruments, their substance and not their form. Merely giving to them a particular name or form (does) not take away the nature and effect of the transaction." Bolling v.

Hawthorne Coal Co., 197 Va. 554, 566, 90 S.E.2d 159, 168 (1955).

Although the contract permits the county to discontinue its promised appropriations, we must also consider the practical effect of such a calamitous event in deciding whether the county in fact would be bound to continue to service the bond issue and, therefore, has incurred a "debt" proscribed by Article VII, Sec. 10(b). The county recognizes the importance of its fiscal integrity. It has been advised that the bond issue would not affect its triple A bond rating. In fact, the contract would prohibit the county from changing its designation of the proceeds of its annual business, professional, and occupational tax as the primary source of appropriations for its annual bond pay-

ments without obtaining "confirmation from those rating agencies that shall have . . . rated and maintained ratings on the Bonds, that the then current ratings on the Bonds will not be reduced as a result of such change."

The county also recognizes the disastrous effect that would follow any failure by the Board of Supervisors to make an annual appropriation and the County argues that such a disaster would never be permitted to occur. That argument implicitly acknowledges that the bond issue would have the practical effect of a long-term debt binding the county.

The predecessor to Article VII, Sec. 10(b) was adopted "(t)o safeguard the credit and fiscal integrity of the counties," A. E. Dick Howard, Commentaries on

the Constitution of Virginia 863 (1974) (emphasis added). In explicating the predecessor to Article VII, Sec. 10(b), we said that

> approval by a majority of the citizens voting on the question properly submitted to them, is a prerequisite to the power of the board of supervisors to create an obligation for any purpose, payable at some future time beyond the termination of the current fiscal year. In no other way, directly or indirectly, can the Board bind the County on any such obligation.

American-LaFrance and Foamite Industries, Inc v. Arlington County, 164 Va. 1, 9, 178 S.E. 783, 786 (1935) (emphasis added).

The plaintiffs here impermissibly seek to accomplish indirectly what they cannot do directly. See, e.g., Hart v. Commonwealth, 221 VA. 283, 290 S.E.2d 806, 811 (1981); Foti v. Cook, 220 Va. 800, 807. 263 S.E.2d 430, 434 (1980). It is obviously contemplated that the issuance of the bonds in accordance with

the contract would bind future boards of supervisors to make annual appropriations of sufficient funds to finance the bonds. Manifestly, the animating purpose of the bond contract arrangement is to create a long-term debt, without submitting the debt to a vote of the qualified voters of Fairfax County.

We hold, therefore, that the obligation thus incurred would be a "debt contracted by the county" in violation of Article VII, Sec. 10(b) and, hence, that the bond issue would be invalid. Accordingly, we will reverse the judgment of the trial court and enter final judgment invalidating the bond issue.

Reversed and final judgment

JUSTICE LACY, concurring.

CHIEF JUSTICE CARRICO, dissenting.

MARCIA P. DYKES

v. Record No. 901033

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

OSGOOD TOWER

v. Record No. 901037

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

JUSTICE LACY, concurring.

This Court has come too far in its consideration of the constitutionality of financial obligations undertaken by state and local governments to declare today that an obligation is a debt for purposes of Article VII 10(b) of the Virginia Constitution when the obligation is only a conditional promise to pay, it is admitted by the parties to be only a moral obligation, and cannot be enforced through any legal process. This holding allows the "disastrous effect" of the

failure to perform to create a legal obligation and directly contradicts the holding and statements made by this Court in numerous prior cases, without any attempt to address, distinguish, or overrule them. E.g., Terry v. Mazur, 234 Va. 442, 451, 362 S.E.2d 904, 909 (1987); Baliles v. Mazur, 224 Va. 462, 469, 297 S.E.3d 695, 698-99 (1982); Harrison v. Day 202 Va. 967, 975-77, 121 S.E.2d 615, 620-22 (1961); Almond v. Gilmor, 188 Va. 822, 840-41, 51 S.E.2d 272, 279 (1949). This is the first instance in which the repayment of bonds is totally dependent on a conditional promise of the governmental unit. Although the "practical effect of such a calamitous event" on the governmental unit should it choose not to keep its promise to appropriate funds was no less present in these prior cases, it

did not transform a conditional appropriation into a debt under Article VII, Sec. 10(b). Baliles, v. Mazur, supra.

I agree with the majority's analysis of the special fund doctrine as it applies to this case. I cannot accept the rational by which the majority reverses the trial court's judgment. The county's promise to pay, which does not have to be kept, although the basis for the security underlying the bonds, nonetheless, does not legally obligate the county to appropriate sums for payment of a debt beyond one year and, therefore, does not run afoul of the constitutional prohibition.*

(*Apparently, financial analyst and bond counsel consider the detriments of nonperformance by the county to be so great that this promise, although not

legally binding, provides sufficient security to potential bondholders to endorse the sale and purchase of these bonds.) Nevertheless, I concur in the result the majority reaches because the contract between the County and the Commission violates the Transportation District Act of 1964, Va. Code Sec. 15.1-1342. et seq.

The Act was passed to allow the provision of transportation services and facilities on a regional basis. As reflected in the Act, effective planning and provision of a transportation infrastructure "cannot be achieved by the unilateral action of the counties." Code Sec. 15.1-1343. The Act is not structured simply to provide a county with a financing mechanism for its own facilities, facilities in which the

District Commission has no interest whatsoever. In this regard, the District Commission is similar to the Ports Authority and Public Building Authority. These entities were created to undertake certain types of projects which would provide directly, or through sale or lease, certain services and facilities.

Consistent with this purpose Sec. 15.1-1359 allows the county to enter into contracts with the commission "pursuant to which . . . (the commission) . . . undertakes to provide the transportation facilities specified in a duly adopted transportation plan, and/or to render transportation service." Here, the commission is neither providing transportation facilities nor rendering transportation services to the county.

It is only providing money to the County which in turn will construct the facilities, own them, and use them to provide transportation services. Code Sec. 15.1-1359 does not authorize the County to enter into a contract with the Commission where neither transportation service nor facilities are to be provided by the Commission. Therefore, in my opinion, the contract at issue is invalid because it violates the Act.

I believe the contract also violates Sec. 15.1-1364(b), which provides that the obligations and indebtedness of a commission "shall not create . . . any . . . obligation . . . of any . . . county . . . either legal, moral, or otherwise. . . " The majority, the appellants, the Attorney General, and even the appellees acknowledge that the contract imposes some

type of obligation on the County. In fact, the Attorney General and the appellees have labeled the obligation a "moral" one. Furthermore, the Contract obligates the County to hold the Commission harmless from any liability or expense "arising out of or in connection with this Contract or the Bonds or the Trust Agreement."

Section 15.1-1364 is not a mere repetition by the General Assembly assuring that a commission obligation would not be "deemed to be" or interpreted as the legal obligation of a county or city subject to the constitutional limitation. See. e.g., Sec. 15.1-1358.2(a)(2). Rather. this section prohibits creating such an obligation in fact. precisely to preclude the type of circumvention of statutory

and constitutional provisions attempted here. The obligation of the Commission to repay the $330.000,000 bonded indebtedness as reflected in the bond, trust, and contract documents creates an obligation "moral or otherwise," on behalf of the County and, therefore, does not comply with the provisions of the Act.

Finally, the concluding proviso of Sec. 15.1-1364(b) states that "nothing in this chapter . . . shall be construed to authorize a commission . . . to incur any indebtedness on behalf of or . . . obligate the . . . county . . . ." Thus, the General Assembly has stressed that the Commission's actions under the statute must comply with the law of the Commonwealth. The Commission's obligations as reflected in the Contract do

not comport with this statutory provision. Therefore, both the County and the Commission are precluded from executing the instant contract under the terms of the Act.

If the trial court's decree validating the bonds in issue is sustained, it is conclusive as to the validity of the "means provided for the payment of such bonds and the validity of all pledges of revenues and of all covenants . . . " Code Sec. 15.1-220. For the reasons set out above, I believe the contract offered as security for the bonds is invalid and, therefore, the judgment of the trial court must be reversed.

MARCIA P. DYKES

v. Record No. 901033

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

OSGOOD TOWER

v. Record No. 901037

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

CHIEF JUSTICE CARRICO, dissenting.

I disagree with the majority. I have great difficulty, however, in stating the basis of my disagreement because I have even greater difficulty in discerning upon what basis the majority invalidates the bonds in question.

The majority concedes that "the contract permits the County to discontinue its promised appropriations." That should be the end of the case. Yet, continuing its search for a basis to invalidate the bonds, the majority says

that the Court "must . . . consider the practical effect of (the County's discontinuance of its promised appropriations) in deciding whether the County in fact would be bound to continue to service the bond issue and, therefore, has incurred a 'debt' proscribed by Article VII, Sec. 10(b)." (Emphasis added.)

The majority notes the County's recognition of "the importance of its fiscal integrity"' as well as "the disastrous effect that would follow any failure by the board of supervisors to make an annual appropriation." Then, opining that the County "impermissibly seek(s) to accomplish indirectly what (it) cannot do directly," the majority says it is obvious that "the issuance of the bonds in accordance with the contract would bind future boards of supervisors

to make annual appropriations of sufficient funds to finance the bonds."

It might be obvious to the majority that the County would be bound to make annual appropriations of sufficient funds to finance the bonds, but it is not obvious to me. This is what the majority is saying: The practical effect of the County's exercise of its contractual right to discontinue the promised appropriations is to make it legally obligated to continue the promised appropriations.

I thought I knew what the term "practical effect" meant. I also thought I knew what the term "legally obligated "meant. And, to me, the two terms meant quite different things. Much to my surprise and dismay, however, the major-

ity says the two terms mean the same thing, and I daresay the business and financial communities in this state will be equally surprised and dismayed at the majority's revelation.

It appears, therefore, that the "practical effect" is the basis of the majority's invalidation of the bonds in question. If that is the basis, I consider it far too slender a reed to support such drastic action.

Rather, in my opinion, the bonds should be invalidated only if the County has undertaken an unconditional express obligation to continue making appropriations to pay the full amount of the bonds. I do not believe the County has undertaken such an obligation, and I would say this whether or not a special fund exists in this case.

The majority fails to even cite, let alone give effect to, important statutory provisions applicable to the transaction involved in this case. Code Sec. 15.1-1358.2(a)(2) provides that "(t)he bonds and other obligations of a (transportation) district (and such bonds and obligations shall so state on their face) shall not be a debt of the Commonwealth or any political subdivision thereof and neither the Commonwealth nor any political subdivision thereof other than the district shall be liable thereon." Furthermore, pursuant to Code Sec. 15.1-1364(b), except for claims cognizable under the Virginia Tort Claims Act, "the obligations and any indebtedness of a (transportation district) commission shall not be . . . a debt or liability of the Commonwealth, or of any

county or city . . . either legal, moral or otherwise."

Furthermore, the contract between the County and the Commission provides that "nothing (therein) shall be deemed to obligate the Board of Supervisors of the County to appropriate any sums on account of any payments to be made by the County (thereunder)" and that the Contract "shall not constitute a pledge of the full faith and credit of Fairfax County." And each bond proposed to be issued by the Commission will bear the disclaimer of the County's liability, as required by Code Sec. 15.1-1358.2(a)(2).

I, too, think the Court should look to the "substance and not (the) form" of the pertinent documents in this case. See Bolling v. Hawthorn Coal Co., 197 Va. 554, 566, 90 S.E.2d 159, 168 (1955).

But I think the Court must also look to the substance of applicable statutory provisions in determining the real effect, rather than a mere practical effect, of the documents in question. And, when I look at the case in this way, I do not see the evil the majority seems to find lurking behind every word the parties have used to express their undertaking.

Nor do I understand how, in the face of all the indicia of non-indebtedness present in the statute, the contract, and the bonds involved in this case, the majority can conclude that the County has incurred binding indebtedness in violation of Article VII, Sec. 10(b). In reaching this conclusion, the majority has taken a mighty leap in logic to get where it wants to go. This is too great a leap for me, and I dissent.

Present: Carrico, C.J., Compton, Stephenson, Whiting, Lacy, and Keenan, JJ., and Poff, Senior Justice

MARCIA P. DYKES

v. Record No. 901033

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

OPINION BY JUSTICE ELIZABETH B. LACY
November 8, 1991

OSGOOD TOWER

v. Record No. 901037

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

UPON REHEARING

On May 3, 1990, the Northern Virginia Transportation District Commission (the Commission) adopted a resolution providing for the issuance of Northern Virginia Transportation District Commission Fairfax County Transportation Contract Revenue Bonds (bonds) in an amount not to exceed $330,000,000. The

proceeds from the sale of the bonds are to be used by Fairfax County to complete the construction of the Fairfax County Parkway. On May 4, 1990, the Commission and Fairfax County, as plaintiff intervenor, filed this bond validation proceeding pursuant to Code Section 15.1-214 in the Circuit Court of Fairfax County. Osgood Tower, Marcia P. Dykes, along with other unnamed taxpayers and citizens of Fairfax County, opposed validation of the bonds.

On July 12, after extended hearings and argument, the trial court validated the proposed bond issue. Tower and Dykes appealed. We consolidated the appeals and on April 19, 1991, this court determined that the trial court erred in validating the bonds. The County and the Commission filed motions for

rehearing, which were granted on June 4, 1991.

Dykes and Tower argue that Art. VII, Section 10(b) of the Virginia Constitution is applicable to the debt which will be incurred by issuing the bonds and, therefore, to be valid, the debt must either be approved by a vote of the people or qualify within the judicially-created "special fund" doctrine. Ihey maintain that neither of these criteria is met in this instance and, therefore, the bonds are invalid.

The thresnold issue for consideration is whether Art. VII, Section 10(b) is applicable to the debt in issue. That section states in pertinent part:

> No debt shall be contracted by or on behalf of any county or district thereof....except by authority conferred by the General Assembly by general law. The General

> Assembly shall not authorize any such debt....unless....provision be made for submission to the qualified voters of the county or district thereof....for approval or rejection by a majority of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt."

1. Commission Debt

Dykes argues that this section is applicable to bonds issued by the Commission because the Commission is a "district" 'created' by one or more cities and counties....proposing to issue bonds "by or on behalf of" the County. "This argument is unpersuasive. The use of the word "district" in the name of the Commission is insufficient to extend application of the section to it. Furtnermore, the Constitution speaks in terms of a "district thereof." The Commission was authorized and created by

statute, and is comprised of the Cities of Alexandria, Fairfax, and Falls Church, and the Counties of Arlington and Loudon, in addition to Fairfax. Code 15.1-342, et seq.; Acts 1964 c. 630. "It remain(ed) in a dormant state until brought into action by the local governing body." Mumpower v. Housing Authority, 176 VA. 426, 446, 11 S.E.2d 732, 739 (1940). The Commission clearly was not "created" by Fairfax County, and is not a "district thereof." The Commission is an independent political subdivision in the same manner as are housing authorities, water and sewer authorities, and industrial development authorities. The enabling legislation, like that of these other authorities vested with the power to incur bonded indebtedness, affirms that debt so

incurred is that of the entity, not of the Commonwealth or any other political subdivision. Code 15.1-1385.2 (a)(2). This statement is repeated in the bonds themselves, as well as in other documents constituting the financing proposal. We have repeatedly held that the debt incurred by legislatively created, independent political subdivisions, whatever their title, is not the debt of the Commonwealth or of any other governmental unit, and we affirm that holding here. Button v. Day, 204, Va. 270, 272-24, 130 S.E.2d 459, 461-62 (1963); Farquhar v. Board of Supervisors, 196 Va. 54, 61, 82 S.E.2d 577. 582 (1954); Mumpower 176 Va. at 451, 11 S.E.2d at 742. Therefore, the debt which will be incurred by the Commission in issuing the bonds is not subject to the

provisions of Art. VII, Section 10(b) of the Virginia Constitution.

2. County Debt

Dykes and Tower next argue that the financing proposal underlying the issuance of the bonds creates a debt incurred by the County which is subject to the constitutional debt limitation of Art. VII, Section 10(b). The financing proposal consists of a contract between the County and the Commission which has been approved but not yet executed, and a proposed trust agreement providing for the transfer of the Commission's interest in the payments received from the County. The contract provides that the Commission will issue the bonds and that the County in turn will fund the annual principal and interest payments and other listed expenses of the bond issue. The

repayment funds will come from the County's general revenues, including the Business, Professional, and Occupational Licensing Tax "or any other revenue appropriated" by the County. Under the terms of the contract, however, the County's obligation to make payments to the Commission is subject to and contingent upon the annual appropriation by the County of moneys for such purposes.

Neither Tower nor Dykes seriously argues the terms of the financing documents impose a legally enforcable obligation on the County to appropriate the funds or to repay the bonds. Indeed, the contract, the trust, the trust agreement, and the bond, Section 4.05, Section 7.01, and Paragraph 3, respectively, each specifically states that the County is not obligated to

appropriate funds or levy taxes for the payment of the bonds and that the financing proposals do not constitute a pledge of the full faith and credit of the County.

Rather, Dykes and Tower invite us to define "debt" as used in Art. VII. Section 10(b) as something other than a legally enforcable obligation to pay. Dykes says constitutional debt exists because the financing proposal creates obligations which the "County" cannot avoid." Tower argues that "subject to appropriation" financing constitutes a pledge of the County's full faith and credit, thereby establishing constitutional debt. Both rely on factors such as the understandings and expectations of bondholders, county officials, and bond rating agencies as creating obligations

on the County. While these indicia may be significant in other contexts, such as whether the financing scheme is good or wise policy, or in determination of the investment grade or credit worthiness of the bonds, here we are only concerned with the limited question whether these indicia, or any other, establish a "debt" of the County subject to Art. VII, Section 10(b).

We have described the attributes of "debt" for constitutional purposes in various ways. "(I)f the political entity is made generally liable, then an indebtedness is created within the debt limitations of the Constitution." Terry v. Mazur, 234 Va. 442, 450, 362, S.E.2d 904, 909 (1987) (quoting Farquhar, 196 Va. at 61, 82 S.E.2d at 582). Obligations which "are not secured by the

general credit of the State or the issuing agency" do not constitute a debt within the constitutional limitation. Button 204 Va. at 272, 130 S.E.2d at 461. And we have held that, for purposes of Art. X, Section 9:

> "we have one criterion for determining the existence of unconstitutional debt: is the full faith and credit of the Commonwealth pledged or committed? If not, no unconstitutional debt is created."

Balliles v. Mazur, 224 Va. 462, 471, 297 S.E.2d 695, 699 (1982).

We have specially rejected the proposition that "subject to appropriation" financing in which the legislative body is not legally obligated to make the appropriation creates state debt for constitutional purposes, Almond v. Gilmor, 188 Va. 822, 842-43, 51 S.E.2d 272, 280 (1949), and have reaffirmed that

holding:

> "Tnere was no constitutionally prohibited debt even though the 'expectation' of these continued appropriations was an essential ingredient in the negotiations ....This did not in any way contractually obligate the state to make these appropriations."

Baliles, 224 Va. at 469,297 S.E.2d at 698-99 (referencing Harrison, v. Day, 202 Va. 967, 121 S.E.2d 615 (1961)).

These cases, whether involving debt incurred by the state or by a county, share a single rational. No debt is created for constitutional purposes if the state or county "incurred no legal liability to underwrite the project." Miller, Att. Gen. v. Watts, Treas 215 Va. 836, 845. 214 S.E.2d 165, 171 (1975). The debt created must involve a "binding and direct commitment," id. at 845, 214 S.E.2d at 172, a commitment which can be

enforced against the maker. There must be a legal obligation.

"Subject to appropriation" financing does not create constitutionally cognizable debt because it does not impose any enforceable duty or liability on the County. Expectations of bondholders. County officials or bond rating agencies do not create County "debt" any more than the expectations of the railway for continued appropriations by the state created debt in Harrison v. Day, supra.

Under the financing proposal at issue, neither the County nor its general revenues is liable for repayment of the debt incurred by the bond issue. In the absence of a legal obligation, the County has not incurred a debt cognizable under Art. VII, Section 10(b).

In summary, we hold that Art. VII, Section 10(b). is not applicable here because no constitutional debt was incurred by the County, and the debt of the Commission is not subject to that constitutional provision. In light of this holding, it is unnecessary to consider application of the special fund doctrine. We have also considered Dyke's other arguments and find them without merit.* Accordingly, we will affirm the judgment of the trial court.

Record No. 901033 - Affirmed.
Record No. 901037 - Affirmed

JUSTICE WHITING, with whom JUSTICE STEPHENSON and SENIOR JUSTICE POFF join, dissenting.

JUSTICE STEPHENSON, with whom JUSTICE WHITING and SENIOR JUSTICE POFF join, dissenting.

MARCIA P. DYKES

v. Record No. 9801033

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL

OSGOOD TOWER

v. Record No. 901037

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL

JUSTICE WHITING, with whom JUSTICE STEPHENSON and SENIOR JUSTICE POFF join, dissenting.

A rehearing of this case has produced no arguments which were not made and considered when a majority of this Court decided that the proposed bond issue was invalid.[1]

[1]Amicus Curiae have filed briefs on rehearing asking, inter alia, that the original decision be made prospective only. I would have had no objection to such an application of the original opinion. See e.g.Harper v. Virginia Department of Transportation, 242 Va. ___, ___ S.E.2d ___ (1991); Harper, v. Virginia Department of Transportation, 241 Va. 232, 240, 241-42, 401 S.E.2d 868, 873-74 (1991); Perkins. v. Albermarle County, 214 VA. 416, 418, 200 S.E.2d 566, 568 (1973).

No matter how the new majority phases it, the present decision is simply an approval of an end run around the constitutional requirement of voter approval before a county can be saddled with long-term indebtedness. Accordingly, for the reasons expressed in the former majority opinion and in the dissent now filed by Justice Stephenson, I dissent.

MARCIA P. DYKES

v. Record No. 901033

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.

OSGOOD TOWER

v. Record No. 901037

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION. et al.

JUSTICE STEPHENSON, with whom JUSTICE WHITING and SENIOR JUSTICE POFF join, dissenting.

I join Justice Whiting's dissent. I write separately, however, to express additional reasons to support my position.

Never before has this Court validated a bond issue like the one in question. I find the scheme employed by the County to be a shocking, patent attempt to circumvent and nullify the requirement of voter approval contained in Section 10(b) (Va. Const. Art. VII).

By the proposed contract with the

Commission, the County would agree to make annual payments sufficient to pay the debt service on the bonds. The funds for these payments are derived solely from, and are contingent upon, annual appropriations from the County's general revenues.

The County contends, and the majority holds. that "no constitutional debt was incurred by the County" because the payments are contingent upon the annual appropriations. Although the County states that the bondholders can expect it to make continuous, annual appropriations, it relies upon its right and power not to do so, i.e., to default without fault, as making the scheme constitutional. We should not validate sucn a scheme.

More importantly, no government should employ such a scheme. Indeed,

"government is, or ought to be, instituted for the common benefit, protection, and security of the people." (Va. Const. art. I, Section 3) and the preservation of a free government requires "a firm adherence to justice, moderation, temperance, frugality, and virtue. Va. Const. art. I, Section 15. These quotations are not merely abstract terms; they are found in the Bill of Rights and have been a part of our basic law since the Commonwealth was established.

Is anyone so naive that they truly believe that the County, in reality, is not compelled to make annual appropriations until the bonds are retired? What are some of the consequences if the County ceases to make the appropriations? Obviously, the bondholders would have no recourse, and

their bonds would be worthless. Quite obviously, also, the County's credit would be seriously impaired, if not destroyed.

The Section 10 requirement of voter approval of long-term county debt has existed for more than six decades. The requirement was not deleted when our constitution was revised in 1971.

More recently, the General Assembly proposed an amendment to Section 10 that would have allowed counties to issue bonds, without voter approval, "for transportation purposes, the principal and interest on which (would have been) payable exclusively from the pledge of revenues and receipts of any local taxes...." Acts 1989, c 670; Acts 1990, cc. 736, 881. On November 6, 1990, however, this proposal was rejected overwhelmingly by the Commonwealth's

voters.

Today, the majority, in effect, has sanctioned what the voters rejected. Consequently, by employing the approved scheme, counties now are at liberty to create bond indebtedness, payable from their general revenues, without submitting the matter to their voters. For all practical purposes, the Section 10(b) debt proscription has been nullified by judicial fiat.

TRANSPORTATION DISTRICT ACT OF 1964

The Northern Virginia Transportation District governed by the Northern Virginia Transportation Commission (NVTC) (NVTC) was established by Chapter 630. Acts of Assembly (Virginia) 933, March 31. 1964. It provided that "The development of a transport system, composed of transit facilities, public highways, and other modes of transportation is necessary . . . a transportation district . . is hereby determined to be the most advisable means of planning and developing a transportation system . . ." The District shall embrace Arlington and Fairfax Counties and the cities of Alexandria, Falls Church and Alexandria. The NVTC "has been empowered . . . to negotiate . . .a compact between Virginia, Maryland

and the District of Columbia." The most significant effort of NVTC has been in regard to METRO, the subway-bus system. All the powers of the "Transportation District Act of 1964," Chapter 631, Acts of Assembly (VA) 631, March 31, 1964, were granted to NVTC.

Article 4 of this Act, as incorporated in Virginia Code 15.1-1357, states: "(a) a commission shall . . . have the following powers and functions:" (when the transportation district is located wholly within a metropolitan area . . . within the Commonwealth of Virginia) "the commission (2) may . . . construct or acquire, by purchase or lease, the transit facilities specified in such transportation plan; (3) . . . may enter into agreements or leases . . . for the operation of facilities. (4) may

enter into contracts or agreements . . . to provide, or cause to be be provided, transit facilities and service . . . and and such contracts and agreements . . . may be utilized by the transportation district to finance the construction and operation of transportation facilities . . ." In this case, NVTC is not constructing or acquiring the transit facilities specified in such transportation plan. It is only creating bonds to finance Fairfax County's parkway, which is not authorized by the Act.

"(d) When a transportation plan has been adopted . . . the Commission shall make a determination of the equitable allocation among the component governments of the costs incurred by the district in providing the transportation

facilities . . ." In this case, there is no allocation; only Fairax County is involved.

Virgina Code 15.1-1359, Article 5, 1. states: "Any county . . . embraced within a transportation district is authorized to enter into contracts or agreements with the commission . . . Any obligations arising from such contract . . . may be paid for, in the discretion of the county or city., in whole or in part, by appropriations from general revenues or from the proceeds of a bond issue or issues." General funds means county funds, as NVTC does not appropriate funds and does not have general funds to appropriate. By analogy, the bonds are those issued by the county.

Va. Code 15.1-1359 (b) states: Except as otherwise provided by law: (1)

No bonded debt shall be contracted by any county to finance the payment of any obligations arising from its contracts hereunder unless the qualified voters of such county shall approve . . . " Fairfax County has not obtained such approval.

Va. Code 15.1-1358.1 (a) (1) states: A transportation district may issue bonds . . . for any of its purposes . . . " As borrowing money for the sole purpose of helping Fairfax County to bypass a Constitutional requirement, is not one of its purposes, NVTC is not authorized to sell such bonds.

Va. Code 15.1-1358.1 (a) (2) states: Bonds . . . of a transportation district . . . shall not be a debt of the Commonwealth or any political subdivision thereof . . ." As Fairfax County is such a subdivision, and as NVTC has no other

source of funds to pay for such bonds, and as the proposed bonds would be moral obligations of Fairfax County, the bonds issued by NVTC to pay for Fairfax County roads are in violation of this provision.

VA Code 15.1-1364 (b) states:". . . any indebtedness of a commission shall not be in any way a debt of. . . any county . . .and shall not create or constitute any indebtedness, liability or obligation of . . .such county . . either legal, moral or otherwise, and nothing in this chapter contained shall be construed to authorize a commission or district to incur any indebtedness on behalf of . . . any county." Fairfax County's contract with NVTC requires the Fairfax County Executive to include in his Annual Budget Proposals for Fairfax County amounts to be allocated to NVTC to make annual

payments on the Fairfax County Parkway Bonds. When the budgets are approved by the Board of Supervisors, they are moral obligations of Fairfax County. Mary Sue Terry, Attorney General of the Commonwealth of Virginia, agrees. In her letter to Delegate Frank Medico of December 29, 1989, in regard to these bonds, she states: ". . . the County's ability to obtain future credit may be jeopardized because of the size of the moral obligation involved. . . the County's assumption of the proposed moral obligation would be inconsistent with the policy underlying the constitutional debt limitatitions because the County's ability to obtain credit could be endangered if the County defaults on the moral obligation."As the County is not permitted by the Code to incur moral

obligations, the county is violating the Code in its contract with NVTC.

The Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Milita, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. 1

The Constitution of the United States

Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
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91-1580 & 91-1664

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

OSGOOD TOWER and MARCIA P. DYKES,
Petitioners,

v.

NORTHERN VIRGINIA TRANSPORTATION
DISTRICT COMMISSION, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION OF RESPONDENT NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION

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QUESTIONS PRESENTED

1. Whether a state supreme court's construction of the debt provisions of its constitution raise federal questions permitting review by this Court.

2. Whether rules of a state supreme court pertaining to its process for considering a case upon rehearing raise federal questions or otherwise warrant this Court's review under Rule 10, Rules of the Supreme Court of the United States.

PARTIES

The Northern Virginia Transportation District Commission was the plaintiff in the trial court and appellee in the Supreme Court of Virginia.

The Board of Supervisors of Fairfax County was an intervenor-plaintiff aligned with the Commission in the trial court and an appellee in the Supreme Court of Virginia.

Marcia P. Dykes and Osgood Tower were defendants in the trial court and appellants in the Supreme Court of Virginia.

Dykes and Tower have filed separate petitions for writs of certiorari in this Court.

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91-1580 & 91-1664

October Term, 1991

OSGOOD TOWER and MARCIA P. DYKES,
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v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION OF RESPONDENT NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION

DECISION BELOW

The decision of the Supreme Court of Virginia is reported as Dykes v. Northern Virginia Transportation District Commission, 242 Va. 357, 411 S.E. 2d 1 (1991).

JURISDICTION

The Northern Virginia Transportation District Commission and the Board of Supervisors of Fairfax County initiated this case to determine whether a proposed bond issue met certain requirements of the

Constitution of Virginia. The trial court granted relief to the Commission and to the Board and validated the bonds. Dykes and Tower, defendants at trial, appealed to the Supreme Court of Virginia which granted writs to review the trial court's decision.

In a decision dated April 19, 1991, the Supreme Court, by a 5-1 majority with one Justice concurring in the result, reversed the decision of the trial court.

In June, 1991, the Supreme Court granted petitions for rehearing and withdrew its April opinion and judgment. The Court heard new argument in September, 1991. On November 8, 1991, the Supreme Court handed down a new decision in which the Court, by a 4-3 majority, affirmed the judgment of the trial court below validating the bonds as constitutional under the Virginia Constitution.

On January 10, 1992, the Supreme Court denied Dykes and Tower's petitions for rehearing. On April 3, 1992, the Supreme Court denied Dykes and Tower's motions to vacate the Court's November 8, 1991 decision.

PROVISIONS OF LAW

Constitution of Virginia: Art. VII § 10(b)

> No debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt except the classes described in paragraphs (1) and (3) of subsection (a), refunding bonds, and bonds issued, with the consent of the school board and the governing

> body of the country, by or on behalf of a county or district thereof for capital projects for school purposes and sold to the Literary Fund, the Virginia Supplemental Retirement System, or other State agency prescribed by law, unless in the general law authorizing the same, provision be made for submission to the qualified voters of the country or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt.

Statute: Sec. 8.01-675.2 of the Code of Virginia (in pertinent part):

> The Supreme Court, on the petition of a party, shall rehear and review any case decided by such court if one of the justices who decides the case adversely to the petitioner certifies that in his opinion there is good cause for such rehearing.

Rule: Rule 5:39, Rules of the Supreme Court of Virginia (in pertinent part):

> (d) No petition for rehearing shall be allowed unless one of the justices who decided the case adversely to the applicant is of opinion that there is good cause for such rehearing. The proceedings upon such rehearing shall be in accordance with § 8.01-675.2 of the Code. No oral argument will be permitted on applications for rehearing.

(e) When a rehearing is granted, the case will be placed on the privileged docket for oral argument. The petitioner may not file any brief in addition to the petition for rehearing. The respondent may file in the office of the clerk of this Court 20 copies of the brief in reply to the petition and shall deliver or mail 3 copies to opposing counsel. Such brief in reply shall not exceed 15 typed or printed copies in length and shall be filed within 21 days after the date of the order granting the rehearing. The respondent will be heard orally whether or not he filed such brief. The case will be called at the next session of the Court after the expiration of the 21 days unless counsel agree that it be called at a session of the Court commencing at an earlier time.

STATEMENT OF THE CASE

This case arises out of the efforts of two citizens to block a proposed bond issue as allegedly invalid under the Virginia Constitution because the Board did not first submit the proposal to the voters in a referendum.

After the trial court validated the proposed bonds under the Virginia Constitution, the two citizens appealed to the Supreme Court of Virginia. Initially, the Supreme Court reversed the trial court.

Because of the far reaching implications of the majority opinion, the Commission and the Board, with the support of numerous amici, petitioned for rehearing. By Order dated June 4, 1991, the Supreme Court ordered that its April judgments "be set aside, the opinion rendered April 19, 1991, be withdrawn and a rehearing granted." See Dyke's Appendix B, p. 19a-20a. The

Court's decision to grant rehearing was made at a conference of the Justices where a Justice orally "certified" that rehearing should be granted. According to the Clerk of the Court, writing on behalf of the Court, this procedure complies with the Virginia requirements. See Dyke's Appendix E, p. 25a.

In September, the Court heard new argument and, by decision dated November 8, 1991, affirmed the trial court and validated the bonds under Virginia law. Thereafter, the Court denied motions to set aside the November opinion.

At the first hearing resulting in the April decision, the sitting Justices of the Supreme Court participated with the exception of Justice Hassell, who had been a partner in one of the firms appearing before the Court, and Justice Compton, who was ill. A Senior Justice and a retired Justice sat in their places. On rehearing in September, the same Senior Justice continued to sit in place of Justice Hassell, but Justice Compton resumed his seat as a regular, sitting Justice. Justice Keenan replaced Justice Russell who had retired during the interim.

SUMMARY OF ARGUMENT

Petitioners seek this Court's review of the Virginia Court's determination that a proposed bond issue does not constitute debt as defined in the Virginia Constitution. Because the ultimate decision was made on rehearing, petitioners also seek this Court's review of the internal procedures followed by the Supreme Court of Virginia pertaining to rehearings in that Court.

These state questions do not satisfy the federal jurisdictional requirements for considering petitions and they fall woefully short of meeting the requirements of

Rule 10, Rules of the Supreme Court of the United States. The petitions should be denied.

ARGUMENT

-1-

THE QUESTION WHETHER THE PROPOSED BONDS ARE VALID CONCERNS ONLY STATE LAW AND DOES NOT CONSTITUTE A FEDERAL QUESTION

Petitioner Tower asks this Court to review the opinion of the Supreme Court of Virginia on the question of whether a proposed Fairfax County bond issue constituted "debt" as that term is used in Art. VII, § 10(b) of the Constitution of Virginia.[1] That question concerns only state law.

Whether phrased in terms of Title 28 § 1257; Rule 10, Rules of the Supreme Court of the United States; comity; federalism; or independent state grounds, there is no basis for this Court to review the decision of the Supreme Court of Virginia which pertained solely to state law. Accordingly, respondent submits that this Court is without jurisdiction or constitutional authority to review this issue. Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1873).

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[1]It is not surprising that Tower concentrates on this issue. At argument on rehearing before the Supreme Court of Virginia, Tower, then represented by Mr. Goldbecker who now serves as counsel to Marcia Dykes, waived all other assignments of error. See Dykes' appendix 16a.

THE QUESTIONS PERTAINING TO THE VIRGINIA COURT'S REHEARING PROCESS DO NOT WARRANT REVIEW UNDER RULE 10

Petitioner Dykes argues that certain internal procedures of the Supreme Court of Virginia pertaining to its rehearing process violate due process. These procedures include: (1) treating the case de novo on rehearing; (2) granting a rehearing for reasons Dykes deems unacceptable; (3) permitting regularly sitting Justices who did not initially sit to sit on rehearing; (4) failure of the Justice voting to grant rehearing to so "certify" in writing; and (5) inability under the Virginia Rules to be able to file a brief in opposition before the Supreme Court acts on the petition for rehearing.

Reasons (1) through (4) concern only state questions and do not raise due process considerations.

1. When a court withdraws its opinion and sets aside its judgment and grants a rehearing, it follows that the rehearing will be de novo. Even if the petitioners here initially misunderstood the process, because the question before the Virginia court was solely a question of law, the only effect was which side would first present oral argument on rehearing. There was no prejudice. In fact, they retained the strategic advantage of rebuttal argument.

2. The Virginia Court is not required to articulate reasons for granting a writ or a rehearing. Even accepting as true that the reasons were not of the type for typically granting rehearing as described by a Justice in a continuing legal

education program, that does not constitute a due process violation warranting review by this Court. It was a matter solely within the discretion of the Supreme Court of Virginia.

3. The method used by a state court to determine whether regular sitting justices will sit in any particular case does not create a federal question.

4. The determination by a state supreme court that its action complies with the procedural requirement of a state statute does not create a federal question, particularly when the state question is whether an oral statement satisfies a statutory reference to "certify."

Reason (5), while described in the context of due process, does not give rise to a legitimate federal question because Dykes was given the opportunity to brief the case prior to the second argument and to participate in that argument.[2] The fundamental requirement of due process is the right to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Dykes' opportunity to present her case, both by brief and argument of counsel, before the dispositive November 8, 1991 opinion was rendered fulfills all due process requirements.

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[2]In fact, petitioners took advantage of three opportunities to brief and orally argue the case in the Supreme Court of Virginia -- first at the petition stage, second at the initial argument before the full court, and third at the rehearing argument.

CONCLUSION

For the foregoing reasons, the Northern Virginia Transportation District Commission requests that this Court deny the petitions.

Respectfully submitted,
Northern Virginia Transportation District Commission

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CERTIFICATE

I hereby certify that this 5th day of May, 1992, we filed forty copies of this Brief of the Respondent Northern Virginia Transportation District Commission in the Clerk's Office and mailed three copies of it to Frederick H. Goldbecker, Esquire, P. O. Box 517, Fairfax, Virginia 22030, counsel for Marcia P. Dykes; Osgood Tower, pro se, 4200 Pineridge Drive, Annandale, Virginia 22003; and Robert Lyndon Howell, Esquire, Acting County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia 22030, counsel for Board of Supervisors of Fairfax County, Virginia.

William G. Broaddus

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

No. 91-1580

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

OSGOOD TOWER,
Petitioner,

v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, Respondent

&

BOARD OF SUPERVISORS, FAIRFAX COUNTY VIRGINIA, Intervenor

PETITION FOR WRIT OF CERTIORARI

PETITIONER'S REPLY MEMORANDUM,

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Treatise on Constitutional Law 5,8
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Correction of Errors in Brief in Opposition

1. In accordance with Supreme Court of the United States Rules 15.2, 24.1(a), and 14, the Brief in Opposition must include "The questions presented for review." The questions on page i of the Brief are not the questions presented for review; see page i of Tower's petition.

2. The second paragraph of page 2 of the Brief states that the initial decision of the Supreme Court of Virginia to reverse was by a 5-1 majority. This decision was actually 6-1, thereby precluding Fairfax County from selling bonds without voter approval.

3. On page 4 of the Brief, the first paragraph under the Statement of the Case says, "This case arises out of efforts of two citizens to block a proposed bond issue . . . " This is not the case. The

effort was not to block the bond issue. The effort was to have the bond issue conform to the requirements of the Virginia Constitution.

4. On page 5 the second paragraph of the Statement of the Case says, "After the trial court validated the proposed bonds under the Constitution . . ." The bonds were not validated under the Constitution. Judge Middleton, in Attachment C of the Judgment on page A-15 of Tower's Petition, states, "The action before this Court, pursuant to Virginia Code Section 15.1-212 et. seq. is purely a statutory proceeding."

5. Paragraph 3 of the Statement of the Case on page 4 says, "Because of the far reaching implications of the majority opinion, the Commission and the Board, with the support of numerous amici, petitioned for rehearing." The mere

desire to change the initial judgment of the Court is not sufficient reason for a rehearing. Sufficient reasons are listed on page 22 of Tower's petition. Lack of sufficient reasons renders a rehearing meaningless and invalidates a rehearing. Matchett v. Rose, 36 Ill.App.3d 638, 344 N.E.2d 770, 779, quoted in Black's Law Dictionary under Res judicata states, "Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them. constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." The rehearing was without jurisdiction.

6. The second paragraph of page 5 indicates that orally certifying that the petition for a rehearing should be granted complies with Virginia

requirements. This apparently arises from Virginia Rule 5:39 which provides that a rehearing will be granted where one of the justices "is of the opinion" that there is good cause for a rehearing. Virginia Code 8.01-675.2 calls for "certification." not "oral certification." Virgina Code 8.01-3D states that any variance between a Rule of the Virginia Supreme Court and an enactment of the General Assembly shall be construed so as to give effect to such enactment. Common usage, Virginia Supreme Court practice, and Black's Law Dictionary establish "certification" as a written statement. If "oral certification" were intended, the Rule would have so stated, as it is an unusual usage. Black's Law Dictionary does not recognize "oral certification."

7. On page 5, the first paragraph

of the Summary of Argument states, "Petitioners seek this Court's review of the Virginia Court's determination that a bond issue does not constitute debt as defined in the Virginia Constitution." Petitioner Tower seeks no such thing. Tower sought enforcement of his Virginia Constitutional right to vote on contracting obviously long-term debt.

8. On page 5, the first paragraph of the Summary of Argument questions Tower's eligibility to be granted a writ of certiorari. The "Treatise on Constitutional Law" by Rotunda, Nowack and Young, states on page 611, "It is important to remember that the Court's rulings concerning the right to vote have come in terms of equal protection. The decision to find the right to vote to be constitutionally 'fundamental' and subject to a meaningful form of judicial

review may best be described as a substantive due process decision . . ." Reynolds v. Sims, 377 US 533, states, (Headnote 3) "The Constitution of the United States secures the right of qualified voters within a state to cast their ballots and have them counted." "(Headnote 15) "A denial of constitutionally protected rights demands judicial protection; the oath and office of Justice of the Supreme Court of the United States require no less of that court." (Headnote 16) "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review, but such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

9. On page 6 of the Brief, the first

paragraph under -1- says. Tower asks this Court if Fairfax Bond issue constitutes "debt" under the Virginia Constitution; that question only concerns state law. Tower asked no such question. See questions on page i of his petition.

10. The last paragraph on page 6 questions the Supreme Court of the United States' authority to review a matter solely pertaining to state law. The answer affirming the Supreme Court of the United States' authority is in paragraph 8 above.

11. In regard to footnote 1 on page 6. Mr. Goldbecker did not waive all other assignments of error as Justice Lacy said in her November 8. 1991. majority opinion. In a letter to the Court of February 12, 1992, Mr. Goldbecker requested the Supreme Court of Virginia to correct this mistake. Only assignments

of error One and Three were waived. Assignments of error Two and Four were not waived. This can be proved by the official tape of the Supreme Court of Virginia hearings.

12. Pages 7 and 8 of the Brief says that Tower's concerns with procedural due process are only state questions and are of no concern of the Supreme Court of the United States. This is not true. Due process is a fundamental right and is subject to scrutiny by the Supreme Court of the United States. Section 15.7 of Volume 2 of the "Treatise on Constitutional Law" (supra) states, "The list of rights which the Court has found to be fundamental, and, therefore worthy of strict judicial scrutiny is not a long one". . . "Fifth (fundamental right), the Supreme Court (of the United States) has recognized that there is a right to

fairness in procedures concerning individual claims against governmental deprivations of life, liberty, and property." The Brief goes on to say that as Tower has been heard in a meaningful fashion by the Virginia Supreme Court, due process requirements have been fulfilled. This is not true as notice (certification required by statute) was not given. and the treatment of Tower by the Court was not equal to that normally received by other litigants. see Tower's petition (91-1580).

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Supreme Court of the United States No. 91-1580.

CERTIFICATE

I, Osgood Tower, Pro Se. hereby certify that on this 11th day of May, 1992 three copies of the Petitioner's Reply Memorandum in the above-entitled case were mailed first class postage prepaid to Robert L. Howell, Acting County Attorney, Counsel for Fairfax County Board of Supervisors, 4100 Chain Bridge Road, Fairfax, Virginia, 22030; William G. Broaddus. Counsel of Record for Northern Virginia Transportation District Commission, McGuire, Woods, Battle & Boothe, One James Center, Richmond, Virginia 23219; A. Francis Robinson, Jr.. Bond Counsel and Co-Counsel for Fairfax County Board of Supervisors, Brown & Wood, One World Trade Center, New York, NY, 10048. and Fredrick H. Goldbecker, Counsel for Marcia P. Dykes, Box 517. Fairfax VA 22030. I further certify that all known parties to be served have been served.

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